IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EL PASO COUNTY, TEXAS, *ET AL.*, *Plaintiffs*, v. DONALD J. TRUMP, *ET AL.*, *Defendants.*	Civil Action No. 3:19-cv-66-DB

BRIEF BY *AMICI* PROJECT ON GOVERNMENT OVERSIGHT, ET AL., IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTEREST OF *AMICI*

All parties have consented to the filing of this *amici* brief. The first *amicus* is the Project On Government Oversight ("POGO"). POGO is a nonpartisan independent organization that, since 1981, has defended constitutional safeguards, among other things.

The individual *amici* include a former Republican Congressman and former Republican executive branch officials. They are described in Appendix A to this brief.

The interest of all *amici* is in seeing that congressional power over appropriations is not improperly shifted to the executive branch. This interest applies regardless of who is President or what is the subject matter of the spending.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 739 of Division D ("Section 739") of the Consolidated Appropriations Act, 2019, Pub. L. 116-6 ("Consolidated 2019"), prohibits the proposed use of funds under 10 U.S.C. § 284 ("284"), and 10 U.S.C. § 2808 ("2808") to construct the southern border barrier. Section 739

applies "Government-Wide" and states in pertinent part: "None of the funds made available in this or any other appropriations Act may be used to increase . . . funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act." Section 739 has two clauses. This brief refers to the clause before "or unless" as Section 739's "prohibition clause," and the clause from "or unless" through the end as Section 739's "exception." Part I below shows that Section 739's prohibition clause applies to $6.1 billion of increased funding proposed by the executive branch for the southern border wall. Part II shows that neither of the proposed uses of 284 and 2808 to increase funding for the southern border barrier satisfies Section 739's exception because neither is a provision of an "appropriations Act." Although Sections 739 is unambiguous, Part III below shows that two canons of construction related to separation of powers favor interpreting Section 739 to preclude the proposed increased funding.

ARGUMENT

I. SECTION 739'S PROHIBITION CLAUSE APPLIES TO THE PROPOSED ADDITIONAL FUNDS UNDER 284 AND 2808

Section 739's prohibition clause applies when two conditions are satisfied: (a) The executive branch proposes to use appropriated funds (b) to increase funding for a program, project, or activity that a President's budget for a fiscal year requested but that Congress has not enacted. Both conditions are satisfied here.

A. The Proposed Increased Funds Are Funds Made Available in an Appropriations Act

Section 739's prohibition clause applies to all $6.1 billion of the funds that the administration has proposed to use under 284 and 2808 because those are all "funds made available in . . . any other appropriations Act." Indeed, the White House issued a statement on Feb. 26, 2019, titled

"The Funds Available to Address the National Emergency at Our Border," that acknowledged that all $6.1 billion constitute "funds appropriated by Congress." Fact Sheet: The Funds Available to Address the National Emergency at Our Border (Feb. 26, 2019), https://wwww.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border/ ("Feb. 26, 2019 White House Statement").

1. 284(b)(7): The two sources of proposed funds for 284(b)(7) construction both use "funds made available in . . . any other appropriations Act." First, 284(b)(7) spending uses appropriations, typically made in an annual appropriations act, to the Department of Defense account for "drug interdiction and counter-drug activities." Department of Defense Appropriations Act, 2019, Pub. L. 115-245, at 17 ("Defense 2019"). Second, the government has stated that appropriations made by Section 8005 of Division A ("Section 8005") of Defense 2019 have been transferred to the same "FY 2019 Drug Interdiction and Counter-Drug Activities account." Feb. 26, 2019 White House Statement.

2. 2808(a): Under its second sentence, 2808(a) uses "only . . . funds that have been appropriated for military construction." This refers to appropriations made by Military Construction Appropriation Acts, typically one for each fiscal year, since before 2808 was enacted on July 12, 1982. *See, e.g.*, Military Construction Appropriation Act, 1982, Pub. L. 97-106, 96 Stat. 1503 et seq. (Dec. 23, 1981); Military Construction Appropriation Act, 1983, Pub. L. 97-323, 96 Stat. 1591 et seq. (Oct. 15, 1982).

Although the first sentence of 2808(a) authorizes certain military construction projects "without regard to any other provision of law," this does not exempt the use of appropriated funds in 2808(a)'s second sentence from Section 739's prohibition. "[T]he meaning of a statute will typically heed the commands of its punctuation." *United States Nat'l Bank of Oregon v.*

Independent Ins. Agents of America, Inc., 508 U.S. 439, 454 (1993). In particular, "[p]eriods . . . insulate words from grammatical implications that would otherwise be created by the words that precede or follow them." A. Scalia & B. Garner, Reading Law 162 (2012); *see also Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (explaining that typically "the 'rules of grammar govern'") (quoting Scalia & Garner at 140). Here, the phrase "without regard to any other provision of law" modifies only the authority in the first sentence of 2808(a) to undertake certain military construction projects. The period after the first sentence means that the "without regard" phrase that appears only in the first sentence does *not* apply to the second sentence. It is only the second sentence of 2808(a) that permits using "funds that have been appropriated for military construction."

Even if that critical period in Section 2808(a) were absent, the clear and unlimited words of the later Section 739 displace the particular application of 2808(a) to provide funding for the wall. Nothing in 2808(a) could limit Congress's power to enact a later statute, such as Section 739, that displaced a particular application of 2808(a). *See* Scalia & Garner, at 279 ("A later legislature's power . . . to make exceptions without specific reference [to a prior statute], and even to make exceptions by implication, cannot be eliminated."). Section 739's statement that "[n]one of the funds made available in this or any other appropriations Act may be used" expressly and clearly prohibits the only potential source of funds under 2808(a)—namely, "funds that have been appropriated for military construction." *See* Scalia & Garner, at 327 (there is "no doubt" that when a later statute "specifically . . . prohibits what [an earlier statute] permitted," this repeals the particular application of the earlier statute's permission of the now prohibited use). That is, the express and clear phrase "funds made available in . . . any other appropriations Act" in Section 739's prohibition clause includes the funds appropriated in every Military Construction

Appropriation Act.

B. The President's Budget Requests Have Sought $12.925 Billion In Increases in Funding for The Southern Border Wall That Congress Has Not Enacted

The southern border barrier was a "program, project, or activity" before fiscal year 2019. In particular, Section 230(a)(1-4) of the Consolidated Appropriations Act, 2018 ("Consolidated 2018") had appropriated $1.337 billion "for fencing along the southern border." Pub. L. 115-141 (Mar. 23, 2018). Indeed, the February 15, 2019 White House Fact Sheet correctly said that "sections of *the* border wall are already being built." *President Donald J. Trump's Border Security Victory*, White House Fact Sheet (Feb. 15, 2019) ("White House Fact Sheet"), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/. That statement described both the $1.375 billion appropriated by Consolidated 2019 and the proposed $6.1 billion in additional funds under 284 and 2808 as "building on that progress." *Id.*

The administration's wall for the southern border as set forth in the President's budget requests has been and remains one program, project, or activity that uses DHS and the Department of Defense acting in coordination. Since the President's Executive Order 13767, issued January 25, 2017, it has been and remains "the policy of *the executive branch*"—including DHS and the Department of Defense—to construct "*a* physical wall on the southern border," defined as "*a* contiguous, physical wall, or other similarly secure, contiguous, and impassable physical barrier." 82 Fed. Reg. 8793, sections 2(a) and 3(e) (emphases added). On January 6, 2019, the President requested $5.7 billion for fiscal 2019 "for construction of a steel barrier for the Southwest border," with construction by DHS "[i]n concert with the U.S. Army Corps of Engineers." Plaintiffs' Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction ("MSJ"), Ex. 28.

Both the President's budget for fiscal year 2020 and budget message, each issued March 11, 2019, requested funding for one coordinated initiative—"the border wall." The accompanying

White House statement issued the same day said that the budget for fiscal year 2020 was proposing "$8.6 billion for *the* border wall, funded by Department of Defense (DOD) and Department of Homeland Security (DHS)." Fact Sheets: President Donald J. Trump is Promoting a Fiscally Responsible and Pro-American 2020 Budget (March 11, 2019) (emphasis added), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-promoting-fiscally-responsible-pro-american-2020-budget/. OMB's Budget Fact Sheet, also issued the same day, likewise referred to "a border wall" and stated that the Department of Defense's "new military construction" was "to assist DHS." 2020 Budget Fact Sheet: A Budget for a Better America (2019), https://www.whitehouse.gov/wp-content/uploads/2019/03/FY20-Fact-Sheet_Overview_FINAL.pdf.

Like the President's budget requests, the proposed funding under 284 and 2808 seeks to build an integrated wall using DHS and the Department of Defense acting in coordination. On February 15, 2019, the White House said that the executive branch would use both the $1.375 billion appropriated by Section 230 of Division D of Consolidated 2019 ("Section 230") and the $6.1 billion of proposed additional funds under 284 and 2808 to "build the border wall." White House Fact Sheet. That Statement further noted that the DHS and Department of Defense, including the Army Corps of Engineers, were coordinating "a work plan for the remainder of FY 2019 and beyond." *Id.* On February 25, 2019, DHS wrote the Department of Defense "requesting that the Department of Defense assist DHS," specifically with "the construction of fences" under 284. MSJ, Ex. 19, at 1–2. DHS stated: "*DHS will accept custody* of the complete infrastructure and account for that infrastructure in *its real property* records and maintain the completed infrastructure." *Id.* at 10 (emphases added); *see also id.* at 4 ("DHS now requires pedestrian fencing."); *id.* at 8-10 (same). DHS set the "DHS order of priority" and DHS "plans to coordinate closely with DOD throughout project planning and execution." *Id.* at 9-10. On March 25, 2019,

the Secretary of Defense agreed, including to "DHS custody of the completed infrastructure," DHS accounting "for that infrastructure in its property records," and DHS operation and maintenance of the completed infrastructure. Letter from Patrick M. Shanahan, Acting Sec'y of Def., to Kirstjen Nielsen, Sec'y of Homeland Sec. (Mar. 25, 2019) (attached as Appendix C). The Secretary of Defense also agreed that the "U.S. Army Corps of Engineers" will "coordinate directly with DHS." *Id.*

The upshot is that both the President's budget requests for and the executive branch's unilateral actions to provide funding for "the wall" or "a barrier" for fiscal 2019 and fiscal 2020 are all attempts to increase funding for a single, coordinated "program, project, or activity"—DHS and the Department of Defense working together to build the wall. This triggers Section 739's prohibition clause against making previously requested, but unenacted, increases in funding for a program, project, or activity.

The President has made $4.325 billion in unenacted budget requests for the program, project, or activity of building the wall for fiscal year 2019 and an additional $8.6 billion for fiscal year 2020. The Executive Office of the President formally requested an increase of $5.7 billion for fiscal year 2019 funding for a "barrier for the Southwest border." MSJ, Ex. 28. (increasing prior request of $1.6 billion). Section 230 appropriated only $1.375 billion for "fencing" and limited the design and locations. As then-DHS Secretary Kirstjen Nielsen admitted to the House Homeland Security Committee in testimony on March 6, 2019, the Administration would not have invoked the other statutes if Consolidated 2019 had provided the additional $4.325 billion in funds for fiscal 2019 that the executive branch had "requested." *See* Sec. Kirstjen Nielsen, Testimony to House of Representatives, Committee on Homeland Security (Mar. 6, 2019), https://www.c-span.org/video/?458250-1/immigration-border-security. President Trump has made similar

admissions. *See Remarks by President Trump in Cabinet Meeting*, White House Transcript (Feb. 12, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-13/ (President Trump stating that because the amount in Consolidated 2019 is "not doing the trick . . . I'm adding to it."); MSJ, Ex. 15 (President Trump stating that because the amount in Consolidated 2019 for "the wall . . . skimped," the President is going to "do the wall . . . much faster"). Congress also has not yet enacted any of the additional $8.6 billion requested for fiscal 2020.

Section 739's express prohibition of the use of requested but unenacted funds extends beyond the end of fiscal year 2019. This is because Section 739 states that its prohibition is triggered by a "budget request for a fiscal year" and continues to apply "until such change is subsequently enacted in an appropriation Act." The adverb "subsequently" means "at a later or subsequent time." *Subsequently*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/subsequently. This adverb alone denotes that Section 739's prohibition extends beyond this fiscal year. Indeed, it has been held numerous times that, when a provision in an appropriation Act uses the adverb "hereafter," which similarly means "after this in sequence or time," *id*., that the provision applies after the end of the current fiscal year. *See* GAO, Principles of Federal Appropriations Law, at 2-86 to 2-87 (4th ed. rev. 2016) ("GAO Principles") (citing authorities); *see Hereafter*, POWERTHESAURUS.ORG, http://www.powerthesaurus.org/hereafter/synonyms/adverb (listing "subsequently" as a synonym of "hereafter"). Moreover, "a fiscal year" is indistinguishable from "any fiscal year," which has been held to extend an appropriation act rider's limit on the use of funds beyond that fiscal year. *See* GAO Principles, at 2-88 (citing authorities).

Finally, it has become routine for there to be a gap between the expiration of one fiscal year and the enactment of a Consolidated Appropriations Act for the next fiscal year. For example,

Consolidated 2019 was enacted four-and-one-half months after the expiration of fiscal year 2018. It would be nonsensical for Consolidated 2019 to enact a prohibition in Section 739 that barred most executive branch run-arounds for seven and one-half months only to permit them all the next day.

II. THE PROPOSED INCREASES IN FUNDING UNDER 284 AND 2808 DO NOT SATISFY SECTION 739'S EXCEPTION

A. The Exclusive Exception to Section 739's Prohibition is When the Executive Branch Uses Funds "Pursuant To The Reprogramming and Transfer Provisions of This or Any Other Appropriations Act"

The February 15, 2019 White House Fact Sheet states that all of the "additional funds" are being "reprogrammed." But that is not enough under Section 739's exception. The text limits 739's exception to when "such change"—the use of appropriated funds to increase funding—"is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act." In the federal budgeting and appropriations process, "'appropriation Act' means" only an Act whose "title" begins: "'An Act making appropriations . . . .'" 2 U.S.C. § 622(5); 1 U.S.C. § 105. Indeed, "[t]he expression 'authorized to be appropriated' . . . clearly indicates that no appropriation is made or intended to be made . . . ." 27 Comp. Dec. 923 (1921).

Section 739's requirement that the transfer or reprogramming authority be provided by an "appropriations Act" contrasts with Section 731. Section 731's exception more broadly states "[u]nless otherwise authorized by existing law."

Section 739's narrower exception is significant for two reasons. First, statutory transfer authority is sometimes provided by other legislation that is not an appropriation Act, such as authorizing legislation. *See* GAO Principles, at 2-39. Transfer authority from provisions in statutes other than an appropriations Act does not fit within Section 739's exception. There is no issue of the presumption against implied repeals because the *express* terms in Section 739 specify

when Section 739 displaces other statutes. *See Robertson v. Seattle Audobon Soc*., 503 U.S. 429, 440 (1992) (when a statutory provision "*by its terms*" sets forth the interaction between that provision and previously existing statutes, "the intent to modify was not only clear, but express") (emphasis in original).

Second, reprogramming authority may be limited by a statute. *See* GAO Principles, at 2-44 to 2-45. Section 739 limits reprogramming authority so that reprogramming provides an exception to 739's prohibition only if "made pursuant to the reprogramming . . . provisions of . . . [an] appropriations Act."

To satisfy Section 739's exception, the final step in the increase in funding must be "made pursuant to the . . . provisions of . . . [an] appropriations Act." The exception in Section 739 applies only if "such change"—that is, using appropriated funds "to increase . . . funding for a program, project, or activity"—"is made pursuant to *the reprogramming or transfer provisions of this or any other appropriations Act.*" (Emphasis added.) The combination of the plural "provisions," the canon that the expression of one thing implies the exclusion of others, and the narrowing connotation of "the" in "the reprogramming and transfer provisions of . . . any other appropriations Act" excludes from 739's exception any use of appropriated funds to increase funding for a program, project, or activity that is "made" in any important part pursuant to either a provision of a non-appropriations Act or to non-statutory authority. *Cf. Freytag v. Comm'r*, 501 U.S. 868, 902 (1991) ("The definite article 'the' obviously narrows . . . .").

The government has admitted that its proposed use of funds is "pursuant to §§ 284 and 2808." Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, at 25, *Sierra Club v. Trump*, 4:19-cv-892 (HSG) (filed April 25, 2019) ("Gov't N.D. Cal. Opp.") (excerpts appended as Appendix B). *See also id.* at 7-8 (funds are being used "pursuant to 10 U.S.C. § 2808"); *id.* at 20

("DoD is acting under its § 284 authority"). The government argues that Section 739's exception permits this spending because the funds "will be used for the purpose for which they were appropriated, not to increase funding for an item in the President's 2020 budget request." Gov't N.D. Cal. Opp. at 24-25. This argument is wrong for four independent reasons.

First, it contradicts the text. Qualifying for Section 739's exception requires more than that the increase uses funds "for the purpose for which they were appropriated." Nothing in Section 739 turns on whether the increased spending violates a different appropriations Act. Indeed, Section 739's *prohibition* applies to "funds *made available in* . . . any other appropriations Act." (Emphasis added.) Section 739's *exception* for increases is limited to when "such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act." Neither 284 nor 2808 is a provision of an appropriations Act. *See* Part II.B and C, *infra*.

Second, the test under Section 739 is whether the funding sought in the unenacted budget request and the proposed funding in the subsequent executive action are for the same "program, project, or activity," *not* the same item. A "program, project, or activity" often consists of multiple items. For example, the Apollo program, also called the Apollo project, had 14 different flights, each of which used countless different items of equipment.

Third, the funding requested in the President's budget requests and the funding proposed in the disputed funding are for the same item. As demonstrated above, that item is "a physical wall on the southern border" built by DHS and the Department of Defense acting in close coordination. *Supra*, at 5–8.

Fourth, the government's argument ignores the fiscal 2019 budget request. President Trump and former DHS Secretary Nielsen have admitted that the reason for the disputed spending for the wall is that Congress did not enact the funding for the wall for fiscal 2019 that the President

requested. *Supra*, at 8. This confirms that the unenacted funding and the disputed spending are for the same "program, project, or activity," thus coming within Section 739's prohibition.

B. Funding Pursuant to 10 U.S.C. § 284(b)(7) Is Not Funding for the Wall "Pursuant to the Reprogramming or Transfer Provisions of . . . Any Other Appropriations Act"

The exception in Section 739 does not permit the use of funding pursuant to 284(b)(7) for increasing funds for the wall above the funds appropriated in Section 230. This is because Section 284 was not enacted as part of an appropriations Act. Rather, 284 was enacted as part of the National Defense Authorization Act, Pub. L. 114-328, 130 Stat. 2000, 2381, 2497 (Dec. 23, 2016). More than four months later, Congress enacted a different statute as the Department of Defense Appropriations Act, 2017, Pub. L. 115-31, 131 Stat. 135, 229 (May 5, 2017).

The government cannot piggyback 284(b)(7) onto Section 8005 of Defense 2019 in order to transform 284(b)(7) into a provision of an appropriations Act. Section 8005 has been used here to authorize only the first step necessary for increasing funding for the wall—"transfer" from DOD's working capital funds to the Defense Department's "FY 2019 Drug Interdiction and Counter-Drug Activities account." Feb. 26, 2019 White House Statement. The second necessary and critical step is the use of funds in the "Drug Interdiction and Counter-Drug Activities account" to fund construction of the wall. For that essential step, the government has invoked 284(b)(7) as the sole claimed statutory authority pursuant to which funds from that Drug Interdiction and Counter-Drug Activities account would be used to construct "fences . . . to block drug smuggling corridors." *See id.* ("Under 10 U.S.C. § 284(b)(7), the United States military may construct 'fences . . .'"). Thus, regardless of Section 8005, because the spending here is "pursuant to [ ] 284," Gov't N.D. Cal. Opp. at 25, and 284 is *not* a "reprogramming or transfer provision of . . . any other appropriations Act," the exception in Section 739 is not satisfied.

Moreover, by its own terms, 8005 does not apply, *inter alia*, "where the item for which funds

have been requested has been denied by Congress." *Accord* 10 U.S.C. § 2214(b). In Section 230, Congress denied funding for border fencing above $1.375 billion, for barriers that are not "fences," for all but certain designs, and at all but certain locations.

C. Funding Pursuant to 10 U.S.C. § 2808(a) Is Not Funding for The Wall "Pursuant To the Reprogramming or Transfer Provisions of . . . Any Other Appropriations Act"

The exception in Section 739 does not permit the use of funds pursuant to 2808(a) to increase funding for the wall because 2808(a) is not a "provision[] of this or any other appropriations Act." 2808(a) is a provision of the Military Construction Codification Act ("MCCA"), Pub. L. 97-124, 96 Stat. 153-177 (July 12, 1982). The MCCA is not an appropriations Act. Neither the title nor any of the provisions of the MCCA makes appropriations.

Rather, 2808(a) provides: "Such projects may be undertaken only within the total amount of *funds that have been appropriated for military construction* . . . that have not been obligated." (Emphasis added.) The phrase "have been appropriated for military construction" refers to a different group of statutes—the Military Construction Appropriation Acts—that have made the appropriations. *See supra*, Part I.A.2. Because 2808(a) is not a part of those Appropriation Acts or any other appropriations Act, using funds pursuant to 2808(a) does not satisfy the exception in Section 739.

III. TWO CANONS RELATING TO SEPARATION OF POWERS FAVOR CONSTRUING SECTION 739 TO BAR THE EXECUTIVE'S PROPOSED FUNDING INCREASES

As the founders knew, "executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J. concurring) (citation omitted). To prevent this from recurring, courts have employed two pertinent canons of construction relating to separation of powers to reject agency interpretations of arguably ambiguous text in a statute. If section 739 were ambiguous, these

canons independently confirm that Section 739 prohibits the disputed $6.1 billion in additional funding.

A. Because Spending Billions to Construct a Southern Border Wall Is An Issue of Immense Economic and Political Significance, Section 739 Should Be Construed So That This Issue Is Not Delegated to Agency Heads

A statute will be read to "delegate a decision of" substantial "economic and political significance" to an agency only if the statute does so clearly and expressly. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). Absent such textual clarity, statutes are construed narrowly to avoid conferring upon agency heads, including the Secretaries of Defense and DHS, the power to make such fundamental policy choices. *Id.*; *accord Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014). Whether to spend billions of dollars on constructing a southern border wall, and where, has been an issue of immense economic and political significance since before Section 739 was enacted. Nothing in Section 739 clearly and expressly delegates that authority to make that decision to the Secretaries of Defense and DHS, who are the agency heads here who claim the statutory authority to spend billions more on constructing a southern border wall than what Congress appropriated in Section 230.

B. Section 739 Should Be Construed to Avoid a Violation of the Presentment Clause and Separation of Powers

"[I]t is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, [a] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quotations and citations omitted). Courts "have read significant limitations into . . . statutes in order to avoid their constitutional invalidation." *Id.* (citation omitted). This canon is not based on legislative intent but rather on "individual policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly." Scalia &

Garner, *supra*, at 249 (emphasis in original).

The government's reading of Section 739 that permits increasing funding for the wall beyond the $1.375 billion that Section 230 appropriated would be unconstitutional. Under the government's reading, Consolidated 2019 appropriated only $1.375 billion for southern border fencing limited to specified locations and designs, but Section 739 permits the executive branch effectively to revise the amounts of funding, locations, and types of barrier based on facts and circumstances that existed before Consolidated 2019 was enacted. It violates the Presentment Clause, however, when a statute appropriates a certain amount for a program, project, or activity but, "based on the same facts and circumstances that Congress considered," gives the executive the option of "rejecting the policy judgment made by Congress and relying on [its] own policy judgment." *Clinton v. City of New York*, 524 U.S. 417, 444 & n.35 (1998). Rather, even when foreign affairs are at issue, a statute may confer on the executive branch authority effectively to change a part of an appropriations Act, or any other statute, only "upon the occurrence of particular events subsequent to enactment." *Id*. at 445. Surely, *Clinton v. City of New York* equally voids statutory permission for either a unilateral executive decrease or increase in spending when there has been no change in facts and circumstances.

The executive branch's announcement on February 15, 2019, that it was using 284 and 2808 was simultaneous with the enactment of Section 739. Accordingly, the executive branch cannot be acting based "upon the occurrence of particular events subsequent to enactment" of Section 739. *Id*. at 445. Rather such executive action "will necessarily be based on the same facts and circumstances that Congress considered," and therefore constitutes a "rejection of the policy judgment made by Congress." *Id*. at 444 & n.35. Accordingly, the government's interpretation that Section 739 permits an executive increase in funding for the wall without a post-enactment

change in facts and circumstances after Consolidated 2019 was enacted violates the Presentment Clause. At a minimum, a court should construe Section 739 to avoid the serious constitutional issue raised by the government's interpretation.

This makes particular sense because a different provision of Consolidated 2019 provides a way for the executive branch to obtain more funding for the wall for fiscal years 2019 and 2020 that does not raise any constitutional issue. Section 230(c) requires DHS to submit to the congressional appropriations committees a plan "that includes the elements required under section 231(a) of Division F of the Consolidated Appropriations Act, 2018." The required elements include the planned "fencing [and] other physical barriers" and "estimates for the planned obligations of funds for fiscal years 2019 through 2027." Consolidated 2018, Div. F., section 230(a)(1), (4). After DHS submits those estimates, the Comptroller General must report its evaluation to the congressional appropriations committees within 120 days. *Id*. Section 231(b); Section 230(c) (readopting this evaluation requirement). The process enacted in Section 230(c) enables the executive branch to persuade Congress to appropriate more money for the wall. Given that Section 230(c) enacted a process for the executive branch to persuade Congress, it renders Section 230(c) superfluous if Section 739 enables the executive branch instead to cut Congress out of the picture altogether.

CONCLUSION

The Court should grant the motion for summary judgment.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of the attached Brief by *Amici* Project On Government Oversight, et al., in Support of Motion for Summary Judgment via the CM/ECF system on May 21, 2019 at 4:30pm.

/s/ Renea Hicks
Renea Hicks

APPENDIX A

To Amicus Brief of Project On Government Oversight, Christopher Shays, Christine Todd Whitman, Peter Keisler, Carter Phillips, John Bellinger III, Samuel Witten, Stanley Twardy, and Richard Bernstein as Amici Curiae

LIST OF INDIVIDUAL *AMICI CURIAE*

Christopher Shays, Representative, U.S. Congress, 1987–2009; Chairman, Subcommittee of National Security and Foreign Affairs of the House Oversight and Government Reform Committee; Member, Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment of the House Homeland Security Committee.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney General for the Civil Division, 2003–2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General, 2002–2003; Assistant and Associate Counsel to the President, 1986–1988.

Carter Phillips, Assistant to the Solicitor General, 1981–1984.

John Bellinger III, Legal Advisor to the Department of State, 2005–2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, 2001–2005.

Samuel Witten, Acting Assistant Secretary of State for Population, Refugees, and Migration, 2007–2009; Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration, 2007–2010; Deputy Legal Adviser to the Department of State, 2001–2007.

Stanley Twardy, U.S. Attorney for the District of Connecticut, 1985–1991.

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APPENDIX B

To Amicus Brief of Project On Government Oversight, Christopher Shays, Christine Todd Whitman, Peter Keisler, Carter Phillips, John Bellinger III, Samuel Witten, Stanley Twardy, and Richard Bernstein as Amici Curiae

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:19-cv-00892-HSG

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: May 17, 2019
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Courtroom 2, 4th Floor

See id. The President explained that this shift requires frontline border enforcement personnel to divert resources away from border security to humanitarian efforts and medical care. *See id.* Further, the President stated that criminal organizations are taking advantage of the large flows of families and unaccompanied minors to conduct a range of illegal activity. *See id.* With additional surges of migrants expected in the coming months, the President stated that border enforcement personnel and resources are strained "to the breaking point." *See id.* at *2. The President concluded that the "situation on our border cannot be described as anything other than a national emergency, and our Armed Forces are needed to help confront it." *See id.*

The situation at the southern border has continued to deteriorate in recent weeks and DHS is facing "a system-wide meltdown." *See* Letter to the United States Senate and House of Representatives from the Secretary of Homeland Security (March 28, 2019). "DHS facilities are overflowing, agents and officers are stretched too thin, and the magnitude of arriving and detained aliens has increased the risk of life threatening incidents." *Id.* In March 2019, there were over 103,000 apprehensions of undocumented migrants along the southern border, the highest one-month total in over a decade. *See* DHS Southwest Border Migration Statistics FY 2019 (Exhibit 4); U.S. Border Patrol Apprehension Statistics Since FY 2000 (Exhibit 5). Over 92,000 of these apprehensions were between ports of entry, compared with 66,884 in February and 47,984 in January. *Id.*; *see* CBP Transcript March FY19 Year to Date Statistics (April 10, 2019) (Exhibit 6).[1]

VI. The Use of Spending Authorities for Barrier Construction

On the same day the President issued the Proclamation, the White House publicly released a fact sheet announcing the sources of funding to be used to construct additional barriers along the southern border. In addition to the $1.375 billion appropriation in the DHS Appropriations Act for Fiscal Year 2019, *see* Pub. L. No. 116-6, § 230, 133 Stat. 13, 28, the fact sheet identifies three additional sources of funding, which it explains will be used sequentially and as needed: (1) About $601 million from the Treasury Forfeiture Fund; (2) Up to $2.5 billion of DoD funds transferred for Support for

[1] The Court may take judicial notice of the official Government documents and the publicly available information on Government websites cited herein and attached. *See Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n.2 (9th Cir. 2018); *People With Disabilities Found. v. Colvin*, 2016 WL 2984898, at *3 (N.D. Cal. May 24, 2016).

Counterdrug Activities (10 U.S.C. § 284); and (3) Up to $3.6 billion reallocated from Department of Defense military construction projects pursuant to 10 U.S.C. § 2808, a construction authority made available by the President's declaration of a national emergency. *See* President Donald J. Trump's Border Security Victory (Feb. 15, 2019) (Exhibit 7). Plaintiffs' motion challenges only the Government's reliance on § 284 and § 2808, not the Treasury Forfeiture Fund.

A. 10 U.S.C. § 284

10 U.S.C. § 284 authorizes DoD to provide "support for the counterdrug activities . . . of any other department or agency of the Federal Government," including for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(a); (b)(7). Congress first provided DoD this authority in the National Defense Authorization Act for Fiscal Year 1991. Pub. L. No. 101-510, § 1004, 104 Stat. 1485 (1990). Congress regularly renewed § 1004 and praised DoD's involvement in building barrier fences along the southern border. For example, in 1993, Congress "commend[ed]" DoD's efforts to reinforce the border fence along a 14-mile drug smuggling corridor in the "San Diego-Tijuana border area" H.R. Rep. No. 103-200, at 330–31, 1993 WL 298896 (1993). Executive Branch officials and Congress have also noted the importance of DoD's involvement in border security projects to prevent drug smuggling. *See* Hr'g Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Testimony of Barry R. McCaffrey) (testifying about the "vital contributions" made by DoD to construct 65 miles of barrier fencings, 111 miles of roads, and 17 miles of lighting "to support the efforts of law enforcement agencies operating along the Southwest Border"); H.R. Rep. No. 110-652, 420 (2008) (describing border fencing as an "invaluable counter-narcotics resource" and recommending a $5 million increase to DoD's budget to continue construction). In light of the threat posed by illegal drug trafficking, Congress permanently codified § 1004 at 10 U.S.C. § 284 in December 2016, directing DoD "to ensure appropriate resources are allocated to efforts to combat this threat." H.R. Rep. No. 114-840, 1147 (2016).

In accordance with § 284, on February 25, 2019, DHS requested DoD's assistance in blocking 11 specific drug-smuggling corridors on Federal land along certain portions of the southern border. *See* Declaration of Kenneth Rapuano ¶ 3 (Exhibit 8). The request sought the replacement of existing

vehicle barricades or dilapidated pedestrian fencing with new pedestrian fencing, the construction of new and improvement of existing patrol roads, and the installation of lighting. *Id.* On March 25, 2019, the Acting Secretary of Defense approved two projects in Arizona and one in New Mexico. *Id.* The current plans for the three projects are as follows:

1) Yuma Sector Project 1:
- Location: Yuma County, AZ, near the Andrade Port of Entry
- Project Description: Replace existing vehicle barriers with pedestrian fencing (5 miles/30-foot fence)

2) Yuma Sector Project 2
- Location: Yuma County, AZ, in the Barry M. Goldwater Air Force Range[2]
- Project Description: Replace existing dilapidated pedestrian fencing with new pedestrian fencing (1.5 miles/18-foot fence)

3) El Paso Sector Project 2:
- Location: Luna County and Doña Ana County, NM
- Project Description: Replace existing vehicle barriers with new pedestrian fencing (46 miles/30-foot fence)

Id.; Declaration of Paul Enriquez ¶¶ 11, 14, 17 (Exhibit 9) (describing project locations in detail and attaching maps).

In order to devote additional resources to border barrier construction, on March 25, 2019, the Acting Secretary of Defense authorized the transfer of $1 billion to the counter-narcotics support appropriation from Army personnel funds that had been identified as excess to current requirements. *See* Rapuano Decl. ¶¶ 5,6. The Acting Secretary of Defense directed the transfer of funds pursuant to DoD's general transfer authority under § 8005. *Id.* The Acting Secretary found the requirements of those statutes satisfied because the transfer was "for higher priority items, based on unforeseen military requirements, than those for which originally appropriated" and "the item for which funds are requested" had not "been denied by the Congress." *Id.*

B. 10 U.S.C. § 2808

[2] The Goldwater Range is a military installation used for air-to-ground bombing practice by U.S. Air Force pilots. *See* Barry M. Goldwater Range Celebrates 75 Years, at www.luke.af.mil/News/Article-Display/Article/1003697/barry-m-goldwater-range-celebrates-75-years. The barriers in this area were constructed to keep people and vehicles from entering "an ordnance testing range for the military." Hearing on the Fiscal Year 2008 DHS Budget, 2007 WL 431584 (Feb. 9, 2007) (Testimony of Secretary of Homeland Security Michael Chertoff).

First enacted as part of the 1982 Military Construction Authorization Act, Pub. L. No. 97-99, § 903, 95 Stat. 1359 (1981), and later amended by the Military Construction Codification Act of 1982, Pub. L. No. 97-214, § 2, 96 Stat. 153 (codifying 10 U.S.C. §§ 2801–08), 10 U.S.C. § 2808(a) provides:

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

In enacting this provision, Congress recognized that "it is impossible to provide in advance for all conceivable emergency situations" and wanted to fill "a gap that now exists with respect to restructuring construction priorities in the event of a declaration of war or national emergency." H.R. Rep. No. 97-44, at 72 (1981).

The term "military construction" as used in § 2808 "includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23)." 10 U.S.C. § 2801(a). Congress in turn defined the term "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4); *see also id.* § 2801(a) (defining "military construction project").

Presidents have invoked the military construction authority under § 2808 on two prior occasions. First, President George H.W. Bush authorized the use of § 2808 in 1990 following the Government of Iraq's invasion of Kuwait. *See* Exec. Order No. 12722, 55 Fed. Reg. 31803 (Aug. 2, 1990); Exec. Order No. 12734, 55 Fed. Reg. 48099 (Nov. 14, 1990). Second, President George W. Bush invoked § 2808 in response to the terrorist attacks against the United States on September 11, 2001. *See* Proc. No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001); Exec. Order No. 13235, 66 Fed. Reg. 58343 (Nov. 16, 2001). The national emergency declaration stemming from the terrorist attacks of September 11, 2001, remains in effect today, *see* 83 Fed. Reg. 46067 (Sept. 10, 2018), and DoD has used its § 2808 authority to build a wide variety of military construction projects, both domestically

19-20. They rely primarily on the principle that, where two appropriations are available to an agency—one for a "specific purpose" and another that "in general terms . . . might be applicable in the absence of the specific appropriation,"—the agency must use the specific appropriation to the exclusion of the general appropriation. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). Plaintiffs have not provided any authority that extends that principle beyond the circumstance of a *single* agency determining which of two appropriations *to that agency* should be used for a particular object or purpose.[4] That is not the case here. DHS is using its $1.375 billion fiscal year 2019 appropriation to construct barriers in the Rio Grande Valley Sector in southern Texas, in accordance with Congress's specific limitations. *See* Pub. L. No. 116-6, §§ 230-32. Separately, DoD is acting under its § 284 authority, which is funded by its own fiscal year 2019 appropriation, Pub. L. No. 115-245, title VI (appropriating over $571 million to DoD for counter-narcotics support), and through an authorized transfer of funds under § 8005 to construct barrier projects in the Yuma and El Paso Sectors.[5] Congress did not address or limit in either DHS's or DoD's fiscal year 2019 appropriations the use of DoD's authority to provide support to DHS through barrier construction activities pursuant to § 284. Indeed, the purpose of § 284 (and its predecessors) is to permit DoD to use its own appropriated funds to support DHS through, among other things, construction of barriers to block drug-smuggling corridors. *See supra* at Background III. If the Court were to accept Plaintiffs' argument, DoD would be prohibited from providing such authorized support under § 284 in any year in which Congress appropriates funds to DHS specifically for border fence construction. Inferring such a restriction—

[4] Indeed, the only authorities Plaintiffs cite involve that very scenario—one agency spending appropriations from Congress to that agency in a situation where two appropriations for the same item were allegedly applicable. *See, e.g.*, *Nevada*, 400 F.3d at 16 (holding that the Department of Energy could properly limit payment to Nevada for certain nuclear waste activities of the state to the $1 million appropriation made to DOE specifically for that purpose; payments in excess of appropriation from a fund created under a general provision of the Nuclear Waste Policy Act was not allowed); *Highland Falls-Fort Montgomery Central Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995) (holding that the Department of Education properly limited payment to school districts under Impact Aid Act to the amount specifically appropriated to the department for that entitlement, rather than applying a more generous allocation formula provided in another provision of the Act).

[5] For the same reason, DHS and DoD have not violated the Purpose Statute. *See* 31 U.S.C. § 1301. Both agencies are applying their appropriations "only to the objects for which the appropriations were made." *Id.* § 1301(a). And, as explained above, because DoD is using its transfer authority conferred in § 8005, it likewise does not violate the Transfer Statute. *See* 31 U.S.C. § 1532 (prohibiting transfer of funds from one appropriation account to another unless "authorized by law.").

principle of appropriations law that [courts] may only consider the text of an appropriations rider." *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016). "An agency's discretion to spend appropriated funds is cabined only by the text of the appropriation." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (quotation omitted). Plaintiffs have identified no restriction in the CAA on the funding of border-barrier construction pursuant to other statutory authorities, nor does its plain text include one. *See* Pls.' Mot. at 6–7; *see generally* Pub. L. No. 116-6 (2019). Congress did not modify any of the statutes at issue here in the CAA. *See id.* And the CAA's funding provisions do not otherwise alter the meaning or availability of permanent statutes already in effect. *See Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 n.5 (9th Cir. 2015), *overruled on other grounds by* 136 S. Ct. 2117 (2016); *see also Olive v. Comm'r of Internal Revenue*, 792 F.3d 1146, 1150 (9th Cir. 2015) (finding that a new appropriations act rider did not inform the interpretation of a previously enacted statute). In the absence of language to the contrary, the grant of a specific appropriation cannot be read to restrict the use of other appropriated funds for similar purposes pursuant to other statutory authority.

Because the court "must consider only the text of the rider" in interpreting the CAA, the history of negotiations between the President and Congress regarding fiscal year 2019 appropriations for border-barrier construction is irrelevant to its meaning. *McIntosh*, 833 F.3d at 1179; *see also Salazar*, 567 U.S. at 200. Had Congress wished to restrict all other border-barrier construction—including construction authorized to be funded under other statutory authorities—it could have plainly so stated. *See McIntosh*, 833 F.3d at 1179. Because the CAA's text includes no such restrictions, neither its limits on border-barrier construction funded by specific DHS appropriations, nor the history of negotiations regarding border barrier construction funding constrains the Acting Secretary of Defense's ability to expend funds pursuant to other statutory authorities. *See Salazar*, 567 U.S. at 200.

In the absence of language specifically restricting the Acting Secretary of Defense's actions, Plaintiffs' claim that those actions are nonetheless prohibited by § 739 of the Financial Services and General Government Appropriations Act, 2019 (a component of the CAA). That provision states:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or

230–32. Most of these restrictions apply to the use of those funds only. *See id.* Plaintiffs do not allege that Defendants have violated the few restrictions that apply generally to all appropriated funds.

> activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or *unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.*

Pub. L. No. 116-6, div. D, § 739 (emphasis added). Plaintiffs claim that, because the President has requested border-barrier funding for fiscal year 2020, no funds in excess of the $1.375 billion specifically appropriated to DHS for border-barrier construction may be used for that purpose. Plaintiffs misapprehend the situation. Any funds utilized for border-barrier construction pursuant to §§ 284 and 2808 will be used for the purpose for which they were appropriated, not to increase funding for an item in the President's 2020 budget request. Thus, the use of funds at issue here comply with the requirements of § 739.

* * *

Because Plaintiffs have not identified a violation of a "clear and mandatory" provision of the challenged statutes, and because this Court does not have jurisdiction over Plaintiffs' § 8005 and § 2808 claims, Plaintiffs are unlikely to succeed on the merits of their statutory claims.

F. The Secretary of Homeland Security Has Waived NEPA's Application to the Section 284 Projects Pursuant to IIRIRA.

Plaintiffs' NEPA claim has no likelihood of success on the merits because the Secretary of Homeland Security waived NEPA's requirements for El Paso Sector Project 1 and Yuma Sector Projects 1 and 2. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17185-87 (Apr. 24, 2019). IIRIRA authorizes such a waiver in conjunction with the statutory directive that the Secretary of Homeland Security "take such actions as may be necessary" to install "physical barriers" on the "United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a). That statutory mandate include a directive requiring DHS to "construct reinforced fencing along not less than 700 miles of the southwest border." *Id.* § 102(b)(1)(A). IIRIRA seeks to ensure expeditious construction pursuant to these mandates by waiving a broad array of legal impediments: "Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines

APPENDIX C

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SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 25 2019

The Honorable Kirstjen Nielsen
Secretary of Homeland Security
Washington, DC 20528

Dear Madam Secretary:

Thank you for your February 25, 2019 request that the Department of Defense provide support to your Department's effort to secure the southern border by blocking up to 11 drug-smuggling corridors along the border through the construction of roads and fences and the installation of lighting.

10 U.S.C. § 284(b)(7) gives the Department of Defense the authority to construct roads and fences and to install lighting to block drug-smuggling corridors across international boundaries of the United States in support of counter-narcotic activities of Federal law enforcement agencies. For the following reasons, I have concluded that the support you request satisfies the statutory requirements:

- The Department of Homeland Security (DHS)/Customs and Border Protection (CBP) is a Federal law enforcement agency;
- DHS has identified each project area as a drug-smuggling corridor; and
- The work requested by DHS to block these identified drug smuggling corridors involves construction of fences (including a linear ground detection system), construction of roads, and installation of lighting (supported by grid power and including imbedded cameras).

Accordingly, at this time, I have decided to undertake Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 by constructing 57 miles of 18-foot-high pedestrian fencing, constructing and improving roads, and installing lighting as described in your February 25, 2019 request.

As the proponent of the requested action, CBP will serve as the lead agency for environmental compliance and will be responsible for providing all necessary access to land. I request that DHS place the highest priority on completing these actions for the projects identified above. DHS will accept custody of the completed infrastructure, account for that infrastructure in its real property records, and operate and maintain the completed infrastructure.

The Commander, U.S. Army Corps of Engineers, is authorized to coordinate directly with DHS/CBP and immediately begin planning and executing up to $1B in support to DHS/CBP by undertaking the projects identified above.

Additional support may be available in the future, subject to the availability of funds and other factors.

Patrick M. Shanahan
Acting